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IN THE DISTRICT COURT OF GUAM

JAMES L. ADKINS, Plaintiff, vs. PAUL SUBA, CHIEF OF GUAM POLICE DEPARTMENT; D.B. ANCIANO; SERAFINO ARTUI; JOHN F. TAITANO; J. P. RODRIGUEZ, AND DOES I THROUGH X, Defendants.	CIVIL CASE NO. **CV09-00029** **PLAINTIFF'S MOTION TO DISQUALIFY OFFICE OF THE ATTORNEY GENERAL; MEMORANDUM OF POINTS AND AUTHORITIES**

INTRODUCTION

Plaintiff James L. Adkins ("Plaintiff") files this Motion to Disqualify the Office of the Attorney General of Guam ("AG") from representing any of the defendants in this case. This Motion is based on the grounds that: (1) Assistant Attorney General Robert Weinberg ("Weinberg") is a necessary witness under Rule 3.7 of the Guam Rules of Professional Conduct ("GRCP"), and (2) the AG's multiple representation of all of the co-defendants in this case constitutes a concurrent conflict of interest under GRCP Rule 1.7.

STATEMENT OF FACTS

Plaintiff filed his Second Amended Complaint ("SAC") on November 24, 2010. In addition to his original claims, plaintiff joined two new defendants, John F. Taitano and Jesse P. Rodriguez, and alleged tampering with his cell phone and destruction of the photographs in his cell phone by defendants Artui, Taitano, Rodriguez, and/or others. In particular, plaintiff alleges that after his arrest he was taken to the Tumon police station and a police sergeant there demanded that plaintiff delete the pictures from his cell phone camera. SAC ¶ 17. When he was later released, plaintiff's cell phone camera was not returned to him but instead was kept by GPD. Id. ¶ 19. After his arrest and the seizure of his cell phone, plaintiff returned to the Tumon police station and signed his signature on the exterior of the plastic custody bag. Id.

After the filing of the complaint in this matter, the Magistrate ordered that the cell phone be returned to plaintiff. On March 10, 2010, plaintiff went to the GPD Property Section at Tiyan to retrieve his cell phone. SAC ¶ 23. He received the cell phone and a GPD Evidence/Property Custody Receipt from ***Taitano*** at about 1:40 p.m. Id. When he picked up his cell phone, the custody bag containing the cell phone was not the same as the one he signed on October 4 after his arrest; instead, it had been placed in a different custody bag and his signature was missing. Id.

The GPD Evidence/Property Custody Receipt (attached to the SAC as Exhibit D) shows that plaintiff's cell phone was logged in on October 4, 2009, the day of plaintiff's arrest, by ***Artui*** at "1648 hrs". It was not logged out, but then logged in again at "12:04 a.m." on October 4 by ***Artui.*** On October 5, 2009 the cell phone was logged into an "evidence box" and later the same day was logged into the "vault/bin". SAC ¶ 24. Nothing further occurred until December 7, 2009 – four days after this lawsuit was filed. Id. On December 7, ***Taitano*** signed out the cell

ARRIOLA, COWAN & ARRIOLA, AGANA, GUAM 96910 phone at 3:05 p.m. for "retrieval of evidence." Id. On the same day, at 3:15 p.m. ***Rodriguez*** signed out the cell phone for "evidence analysis". Id. The cell phone was relinquished to ***Rodriguez*** "by direction and verbal standing instruction by Mr. Jim Mitchell." Id. Over an hour later, at 4:35 p.m., the cell phone was returned by ***Rodriguez*** to ***Taitano***. Id. Plaintiff alleges that Artui, Taitano, Rodriguez and/or others tampered with plaintiff's cell phone and destroyed it by exposing it to water, erasing the contents, or applying voltage to it, and that the tampering of plaintiff's cell phone. SAC ¶ 27.

Assistant Attorney General Robert Weinberg purportedly represents defendants Suba, Anciano, and Artui. A. P. Arriola Decl., Exh. A. Assistant Attorney General Kenneth Orcutt purportedly represents defendants Taitano and Rodriguez. Id., Exhs. B, C, D. As both Weinberg and Orcutt are Assistant Attorney Generals and employees of the AG, the AG represents all of the co-defendants.

On December 14, 2010, plaintiff's counsel and Weinberg met to discuss possible resolution of this case. A. P. Arriola Decl. During their discussion, the attorneys discussed plaintiff's new tampering and destruction claims in the SAC. Id. Weinberg disclosed that, with respect to such claims, defendants Taitano and Rodriguez would be asserting the defense of "reliance upon advice of counsel." Id. He stated:

> I was the counsel and they relied on me. I was the one that told them to take the camera and see what was in it. See, I thought, and I still think, that the pictures would show that Mr. Adkins took the photos from the road, and not off the road as he claims. So Taitano and Rodriguez took the camera but they said when they checked it, they couldn't turn it on and I told them to go to a store to get a charger. But they still couldn't turn it on.

Id.

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The photographs taken by plaintiff on October 4 of the automobile accident scene are the crux of plaintiff's case against defendants. SAC ¶ 28. Among other things, they would have shown that plaintiff was not obstructing any governmental function, which is one of the charges against him. Plaintiff submits that Weinberg is disqualified from representing any of the defendants because he is a necessary witness. He has first-hand knowledge and involvement in actions taken by Taitano and Rodriguez concerning plaintiff's cell phone. His actions, conduct and credibility are key issues in this case. The AG is disqualified from representing any of the defendants because all of the lawyers in that office have a concurrent conflict of interest with their clients.

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ARGUMENT

I. WEINBERG IS A NECESSARY WITNESS.

The defense of qualified immunity in a civil rights case may be based upon advice of counsel. Ewing v. City of Stockton, 588 F.3d 1218, 1234 (9th Cir. 2009) (holding that arresting officers had qualified immunity where they relied upon advice of prosecutor).[1] Where advice of counsel is at issue, the attorney-client privilege is waived. Mitzner v. Sobol, 136 F.R.D. 359, 361-362 (S.D.N.Y. 1991). In order to rebut this defense, plaintiff is entitled to discover all communications between Taitano, Rodriguez, and Weinberg, the advice Weinberg provided, and his clients' reliance upon the advice. Miller v. Colorado Farms, 2001 WL 629463 *2 (D.Colo.) (opposing party is entitled to discover all testimony and evidence bearing upon advice of counsel defense); N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987) (plaintiff is entitled to depose attorneys who provided the advice that is the basis of the defense).

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[1] Weinberg admitted to plaintiff's counsel that Taitano and Rodriguez would rely upon the advice of counsel in a settlement meeting. Guam R. Evid. 408 excludes evidence presented "in the course of compromise negotiations" when the purpose is proving the validity or invalidity of a claim or its amount. This Rule "does not require exclusion *when the evidence is offered for another purpose*, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." (Emphasis added). The listed examples of permissible use in Rule 408 are illustrative, not exhaustive. Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 454 (D. Md. 2002). Weinberg's admissions are offered for the purpose of establishing violations of the GRPC.

GRPC Rule 3.7(a) provides that a lawyer shall not act as advocate at a trial in which the lawyer is "likely to be a necessary witness" unless disqualification of the lawyer would work substantial hardship on the client. Weinberg is a necessary witness. By his own assertion, he gave advice to Taitano and Rodriguez about retrieving the cell phone and the photographs. A critical issue here is, what happened to plaintiff's cell phone and the photographs in it? What Weinberg did and said, his advice to Taitano and Rodriguez, what they did with the cell phone, and what they reported to him when they retrieved the cell phone and looked for the photographs, are all relevant and material. Even if Taitano and Rodriguez do not intend to call him as a witness, plaintiff certainly may. The question is not "*whether* a party will call a lawyer as a witness, but whether the attorney *ought* to be called as a witness." Miller, 2001 WL 629463 *4, citing FDIC v. Isham, 782 F. Supp. 524, 528 (D. Colo. 1992) (emphasis in original). In Isham, the defendants asserted reliance upon advice of counsel as their defense, but stated that they did not intend to call their attorney to support their defense. Nonetheless, the court concluded that the lawyer "ought" to be called as a witness, if not by the defendants, then perhaps by the plaintiff. Isham, 782 F. Supp. at 528. Here, Weinberg ought to be called as a witness because of his personal involvement in the case and because the advice of counsel defense is potentially dispositive of the tampering and destruction claims against Taitano and Rodriguez.[2]

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[2] Even when the advice of counsel defense has not been raised yet, where there is a possibility that it might be raised, the attorney should be disqualified. U.S. v. Anderson, 319 F.3d 1219, 1221-22 (10th Cir. 2003) (although advice of counsel defense not yet raised, lawyer disqualified due to his personal involvement in the matter, otherwise he would be free to function as an unsworn witness before the jury or would likely be called as witness at trial); U.S. v. Matsa, 2010 WL 4117548 *5 (S.D. Ohio) (advice of counsel defense not yet raised, but lawyer held disqualified due to his role in drafting letter responding to grand jury subpoena).

Whether Weinberg's disqualification would work substantial hardship on the AG's clients requires a balancing of interests of the client, the tribunal, and the opposing party. Comment [4], Model Rules of Professional Conduct Rule 3.7.[3] Weinberg's disqualification would not work substantial hardship on any of the defendants. "It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." Comment [4], Model Rule 3.7 (emphasis in original); see Guaranty Corp. v. National Union Fire Ins. Co., 1993 WL 165690 *8 (E.D. La.) (disqualifying lawyers as necessary witnesses and their law firms where they were "on notice as to problems with their representation"). It was not only reasonably foreseeable, but Weinberg knew that he was a necessary witness on a material matter, given his assertion that he was the attorney who advised Taitano and Rodriguez, and he knew that they would rely upon the advice of counsel defense. See A. P. Arriola Decl. Weinberg filed an Appearance of Counsel in this case on June 30, 2010, only six months ago. Plaintiff filed his SAC on November 24, 2010. All of the defendants have been served except for Taitano, but none of the defendants have filed an answer or responsive pleading to the SAC. A.P. Arriola Decl. Except for the exchange of initial disclosures, discovery has been stayed. A trial date has not been scheduled. Under all of these circumstances, defendants would suffer no substantial hardship if Weinberg is disqualified from representing them.

Comment [1] to Model Rule 3.7 recognizes that combining the roles of advocate and witness can prejudice an opposing party: "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as

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[3] The GRPC were adopted from the 2002 ABA Model Rules of Professional Conduct. See In re Amendments to the Guam Rules of Professional Conduct, Promulgation Order No. 04-002. The Comments referenced herein are the Comments to the Guam counterparts in the 2002 ABA Model Rules of Professional Conduct ("Model Rules").

proof or as an analysis of the proof." Plaintiff would be severely prejudiced and handicapped in challenging Weinberg's credibility when Weinberg is also appearing as an advocate at trial. Whether or not Weinberg is called as a witness at trial, Taitano and Rodriguez will be asked about their communications with Weinberg, about the advice he provided to them, and about their reliance upon Weinberg's advice. Even if he does not testify, Weinberg will appear to the jury as an unsworn witness,[4] and Weinberg will not be able to present this case without being both witness and advocate to the events surrounding his advice to Taitano and Rodriguez, the tampering of the cell phone, and destruction of photographs.

Permitting Weinberg to continue as an advocate in this case in which he is likely to testify would also risk "undermining the public's perception of the integrity of the proceedings and may impair the fairness of the trial." Matsa, 2010 WL 4117548 *4, citing General Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704, 711 (6th Cir. 1982); see Isham, 782 F. Supp. at 528 (disqualification should be imposed where the claimed misconduct in some way "'taints' the trial or the legal system."). In Isham, where advice of counsel was at issue, the court found "a substantial risk that a jury will be confused by an advocate also appearing as a witness." Id. The same circumstances exist here. Weinberg's dual role would taint the trial and give Taitano and Rodriguez an unfair advantage: he would act as both witness and advocate in advancing their defense. Weinberg would be able to implicitly testify before the jury by offering opening or closing summations that support the advice of counsel defense or interpret the conduct of Taitano and Rodriguez. See Locascio, 6 F.3d at 933 ("attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination."). Aside from his advice, Weinberg may also have knowledge that would

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[4] An attorney acts as an unsworn witness when the attorney has acquired, through his relationship with his client, first-hand knowledge of facts that will be presented at trial. United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993).

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corroborate or detract from their testimony that the cell phone had already been tampered with and the photographs destroyed. Conversely, his effectiveness as counsel for all of the defendants could be diminished in the jury's eyes if the plaintiff damages his credibility as a witness or shows that he gave bad legal advice. Matsa, 2010 WL 4117548 *4; see Munk, 697 F. Supp. at 786 (advocate who becomes witness is in unseemly and ineffective position of arguing his own credibility). In both instances, the integrity of the judicial process and the fairness of the trial would be impaired. See United States v. Castellano, 610 F. Supp. 1151, 1167 (S.D.N.Y. 1993) (disqualification from representation of defendant at trial warranted given that mere appearance of testifying attorney at counsel's table was sufficient to distort factfinding process). Under all of these circumstances, Weinberg is a necessary witness and is disqualified from representing the defendants in this case.

II. THE AG HAS A CONCURRENT CONFLICT OF INTEREST WITH ITS CLIENTS.

GRCP Rule 3.7(b) provides that "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Comment [7] to this rule provides that if "the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7." Weinberg and the AG have a concurrent conflict of interest with their clients and are disqualified from representing them under Rule 1.7(a)(2), where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." (Emphasis added)

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A. Weinberg's and the AG's representation of some of the defendants in this case will be materially limited by their responsibilities to the other defendants.

Significantly, the AG recognizes that there is a conflict of interest between the AG's lawyers and their clients, as Weinberg and Orcutt are attempting to represent separate groups of defendants in this case. If they did not believe that there was a conflict of interest, separate representation would be unnecessary. Client loyalty is at the heart of the conflict of interest rules. Comment [1], Model Rule 1.7. Weinberg, Orcutt and the AG have a serious conflict of interest in representing all of the defendants, as there is a significant risk that their loyalty for each of the defendants will be severely limited. Taitano and Rodriguez will assert that they relied upon Weinberg's legal advice; Artui and Suba have no such defense. Artui and Suba could assert cross-claims against Taitano and Rodriguez or point to the latter as being culpable, but Artui and Suba are prevented from doing so because *their own attorney* has provided a built-in defense for Taitano and Rodriguez. Moreover, Anciano, Artui and Suba are at a disadvantage because their own attorney will be testifying for Taitano and Rodriguez. A jury may wonder why Anciano, Artui and Suba did not have benefit of advice of their own counsel, and could find in favor of Taitano and Rodriguez, but against Suba, Artui, and Anciano.

In addition to loyalty, independent judgment is an essential element in the lawyer's relationship to client. Comment [1], Model Rule 1.7. Comment [8] to Model Rule 1.7 states that a lawyer's multiple representation of clients may be materially limited "in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client." Here, the independent professional judgment of Weinberg, Orcutt and the AG is impaired. For example, Weinberg and the AG may be constrained from proposing certain defenses or making certain arguments on behalf of Artui or Suba (such as

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pointing to Taitano and Rodriguez as the culpable defendants) in order to bolster the advice of counsel defense for Taitano and Rodriguez. Orcutt and the AG may not pursue certain defenses or arguments on behalf of Taitano and Rodriguez due to their heavy reliance on Weinberg's (i.e., the AG's) advice and their loyalty to Weinberg. In both instances, the question arises, whose interest is the AG protecting – their clients', Weinberg's, or their interest in upholding the AG's legal advice? Weinberg, Orcutt, and the AG cannot reasonably be expected to provide Suba, Artui, Anciano, Taitano and Rodriguez with an unbiased assessment of their clients' defenses. The defendants' right to independent and loyal counsel is all the more critical because, if found liable in this case, the defendants' tampering with plaintiff's cell phone and destruction of the photographs may constitute violations of criminal federal law (18 U.S.C. § 1512(c)) and Guam law (9 G.C.A. §§ 34.50(c), § 46.25, 52.60, and 55.10(a)(1) and (3)).

A critical concern for plaintiff is that if any of the defendants is found liable, such defendant may file post-trial motions for a new trial due to the conflict of interest created by the AG's multiple representation of the defendants. This is what occurred in Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984). The county attorney represented Robert Pfeiffer, a police officer, and the county of Suffolk in a civil rights lawsuit filed under 42 U.S.C. § 1983. In the course of the trial, the county attorney undermined Pfeiffer's defense that he was acting within the scope of his official duties, which arguments benefited the county. The county was found not liable but Pfeiffer was found liable for compensatory and punitive damages totaling $20,000.00. Pfeiffer filed a motion for a new trial on the grounds that he failed to receive a fair trial. The district court denied the motion but on appeal the appellate court reversed and remanded the case for a *whole new trial* due to the conflict of interest created by the county attorney's joint representation of the county and Pfeiffer. Dunton, 729 F.2d at 909.

Because of the serious conflicts of interest here, disqualification is appropriate now, before any further proceedings such as motions or discovery, begin in the case. See Armstrong v. McAlpin, 625 F.2d 433, 444-46 (2d Cir. 1980) (*en banc*) (disqualification appropriate when conflict will taint a trial by affecting attorney's presentation of a case); Shadid v. Jackson, 521 F. Supp. 87, 88-90 (E.D. Tex. 1981) (lawyer disqualified from representing both city and its employee in civil rights action due to unfairness inherent in multiple representation of clients and "high potential for conflicting loyalties"); see also United States v. Voigt, 89 F.3d 1050, 1078 (3rd Cir. 1996) ("the legitimate wish of [courts] that their judgments remain intact on appeal" is a proper consideration in determining whether a conflict of interest requires disqualification of an attorney).

B. Weinberg's and the AG's representation of the defendants will be materially limited by Weinberg's and the AG's personal interests.

Weinberg was not merely giving legal advice in his capacity as a lawyer, he was giving legal advice *on behalf of the AG*[5]. Weinberg and the AG have a personal interest, namely upholding the soundness of their legal advice, which materially limits their representation of the defendants. Plaintiff is entitled to discover the AG's policies and practices in giving legal advice to police officers concerning the handling and disposition of evidence stored at GPD. Weinberg is more easily impeachable for his and the AG's interest, and thus may be a less effective witness for any of the defendants. Weinberg's and the AG's representation of all the defendants in this case is impaired because Weinberg's actions and credibility are at issue, as well as the soundness of his legal advice. The jury could conclude that Weinberg's instructions and advice implicate him in the same unlawful conduct with which Suba, Artui, Taitano and Rodriguez are charged.

[5] The Attorney General is the Chief Legal Officer of the Government of Guam. 48 U.S.C. § 1421g(d)(1).

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Where, as here, the actions of a party's lawyer are at issue in a case and the client's interests may be prejudiced, neither the lawyer nor his law firm can provide "independent arm's length counsel" to their clients and they are all disqualified. Miller v. Alagna, 138 F.Supp.2d 1252 (D.C. Cal. 2000) (disqualifying lawyers who defended city and police officers in civil rights suit and who knew of potential conflicting defenses at outset); Guaranty Corp., 1993 WL 165690 **7-8 (disqualifying lawyers and their law firms from all stages of case where lawyer's actions were at issue in case); Mutual Life Ins. Co. v. Liberty Mut. Ins. Co., 746 F. Supp. 375, 377-78 (S.D.N.Y. 1990) (disqualification of counsel and her firm for all purposes of action appropriate where attorney ought to be called as witness at trial, even where attorney's testimony likely to be helpful to client); Munk v. Goldone Nat'l Corp., 697 F. Supp. 784, 786-87 (S.D.N.Y. 1988) (disqualifying law firm from both pre-trial and trial representation, even where testimony not necessarily adverse to clients, where lawyer's own conduct as party's attorney is at issue in case).

CONCLUSION

For all of the foregoing reasons, plaintiff James L. Adkins respectfully requests that the Court grant his Motion to Disqualify the Office of the Attorney General from representing any of the defendants in this case.

Dated this 4th day of January, 2011.

ARRIOLA, COWAN & ARRIOLA
Attorneys for Plaintiff James L. Adkins

By: [signature]
ANITA P. ARRIOLA

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2011, a true and correct copy of **PLAINTIFF'S MOTION TO DISQUALIFY OFFICE OF THE ATTORNEY GENERAL; MEMORANDUM OF POINTS AND AUTHORITIES** was served electronically with the Clerk of Court using the CM/ECF System and hand-delivered to:

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Dated this 4th day of January, 2011.

[signature]
ANITA P. ARRIOLA

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